

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN
AND FOR THE COUNTY OF MODOC

W. A. Hill, C. A. Smalls and E. B. Smalls,
A. E. Rinehart, E. J. Beebe, Nora J. Street,
and Nora J. Street as Guardian of the persons
and estates of Mildred and Marie Street, minors,
H. A. Rinehart, J. L. Toney, L. E. McCulley,
T. B. Sizer, Jake Weber, Mauda Page and Mae S.
Page his wife, Melvon Miller, Administrator of
the estate of Farley Street, deceased, Melvon
Miller, Guardian of the person and estate of
Rea Unita Street, a minor, Melvon Miller,
Executor of the estate of Ella Lazetti Scammon,
deceased, and Harry L. Hill,

Plaintiffs,

vs.

Herman Acty, Robert O. Fink, John Doe, Richard
Roe and Hiram Moe,

Defendants.

No. 2343

Judgment and

Decree

The above entitled action came on regularly for trial this
15th day of February, 1923, before the above-entitled Court, Honorable
J. O. Monr^ceur, Judge therein presiding, the plaintiffs appearing by and
through their attorney A. K. Willie, Esq., and the defendants Herman Acty
and Robert O. Fink, appearing by and through their attorney D. B. Robnett,
Esq., and the cause having been dismissed as to the other defendants above
named; and the said plaintiffs and defendants, by and through their respective
counsel, in open court duly consented to a trial of said case at this time;
and thereupon said parties plaintiff and defendant acting by and through their
said counsel presented to the said Court a Stipulation and agreement signed
by all of the parties, wherein and whereby all of said parties consented to the
entry of a decree herein in accordance with the terms of said stipulation
and agreement, and said stipulation and agreement having been duly filed
in said court and cause, and the parties having in open court waived findings
of fact and consented to the entry of a judgment herein, and said Court
having examined said stipulation and it duly appearing therefrom and from the
pleadings in said case that said Court has jurisdiction of all of said parties,

and of the subject matter of said case and by reason of said stipulation and agreement said Court has jurisdiction to make and enter a decree in accordance with said stipulation and agreement, and said counsel for the respective parties having presented this decree to said Court as a proposed decree to be entered in said action and having consented to the entry of this decree in said action, now, therefore,

The Court hereby findings from said stipulation and agreement and ORDERS, ADJUDGES AND DECREES, as follows:

1. That at the time of the commencement of this action said Nora J. Street, was and is now the duly appointed, qualified, and acting Guardian of the persons and estates of Mildred and Marie Street, minors.

2. That at the time of the commencement of this action said Melvon Miller, was and now is the duly, appointed, qualified and acting Administrator of the estate of Farley Street, deceased; and was and now is the duly appointed, qualified and acting, Guardian of the person and estate of Rea Onita Street, a minor, and was and now is the duly appointed, qualified and acting executor of the estate of Ella Lazette Scammon, deceased.

3. That at the time of the commencement of this action, the plaintiffs were and now are the respective owners of the respective lands claimed by them in their complaint on file herein which said lands are particularly described in said Complaint paragraph five thereof.

4. That plaintiff Harry L. Hill, was not an original party plaintiff in said action but subsequent to the commencement of said action, and in said written stipulation he was made a party plaintiff and signed said stipulation and agreement of settlement in this case.

5. That said Harry L. Hill is now and at the time of signing said stipulation and agreement was the owner of certain lands in the vicinity of lands of the other plaintiffs which were and are entitled to water from the creek hereinafter described. That said lands of said Harry L. Hill are more particularly described as follows, to-wit:

All those certain lots, pieces and parcels of land situate in the County of Modoc, State of California, and particularly described as follows, to wit:

The southwest quarter of the Northwest quarter, and Lots two, three and four of Section 27, and lot one of Section 34, all in township 43 North, Range 16 East, M.D.M.

6. That the defendant Herman Acty and Robert O. Fink own lands near or adjoining said creek hereinafter described, which are irrigable from said creek.

7. That there is in said Modoc County a certain natural stream of water known as and called Cedar Creek, which said Creek, rises on the eastern slope of the Warner Range of mountains in said County, and west of the lands of the parties hereto, and flows thence in a well defined channel between well defined banks, near all of the lands of said plaintiffs and defendants and flows over and across some of said lands.

8. That all of the parties hereto claim rights in and to the waters of said creek, and in accordance with said stipulation and agreement, it is hereby ORDERED, ADJUDGED AND DECREED, that the waters of said Cedar Creek are owned by the parties hereto in the amounts hereinafter specified, and the parties hereto are severally entitled to divert and use water from said Cedar Creek, in the amounts, and at the times and in the manner following, to wit:

A. The plaintiff L. E. McCulley, as against all of the parties plaintiff and defendant herein, is the owner of and is entitled to divert and use as a first right two hundred and fifty inches of the waters of said Cedar Creek, measured under a four inches pressure, said right being superior to any right, title or claim of any of the other plaintiffs herein and to any right, title or claim of any of the defendants herein.

B. That subject to the said first right of said L. E. McCulley to the first two hundred and fifty inches, of the waters of said Cedar Creek,

measured under a four inch pressure, all the other plaintiffs are jointly the owners of and entitled to divert and use, as against all of the defendants, the next Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, said seven hundred and fifty inches of the waters of said creek being owned by said plaintiffs in the several amounts hereinafter specified, to wit:

1. Mada Page and Mae S. Page his wife, are the owners of Fifteen inches of the said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of their lands described in said complaint. ✓

2. T. B. Sizer is the owner of Forty inches of the said Seven hundred and fifty inches, of the waters of said creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint. ?

3. Jake Weber is the owner of fifty-five inches of said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint. }

4. J. L. Toney is the owner of fifty inches of the said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint. . ?

5. Nora J. Street, and Nora J. Street as Guardian of the persons and estates of Mildred and Marie Street, minors, is the owner of one Hundred and Fifteen inches of the said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of the lands owned by her and described in said complaint.

6. H. E. Rinehart is the owner of Forty inches of the said Seven Hundred and fifty inches of the waters of said Creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint.

7. Melvon Miller, as Guardian of the person and Estate of nea Unita Street, a minor, and as Administrator of the Estate of Farley Street, deceased, and as Executor of the Estate of Ella Lazetti Scaamon, deceased,

is the owner of Seventy inches of the said Seven Hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint.

8. E. J. Beebe is the owner of One hundred and thirty inches, of the said Seven Hundred and Fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint.

9. A. E. Rinehart is the owner of One hundred and twenty-five inches of the said Seven Hundred and fifty inches of the waters of said creek, measured under a four inch pressure for the irrigation of his lands described in said complaint.

10. W. E. Hill is the owner of Ten inches of the said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of his lands described in said complaint.

11. C. A. Smalls and E. B. Smalls are the owners of Fifty-five inches of the said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure, for the irrigation of their lands described in said complaint.

12. Harry L. Hill is the owner of Forty-five inches of the said Seven hundred and fifty inches of the waters of said creek, measured under a four inch pressure for the irrigation of his lands in this decree described.

C. That whenever the amount of water flowing in said creek, after supplying and deducting the said Two hundred and fifty inches owned by said L. E. McCulley, is less than Seven hundred and Fifty inches, measured under a four inch pressure, the said plaintiffs in subdivisions one to twelve inclusive, of paragraph B, of this decree, shall share in the ownership and use of the water flowing in said creek in excess of said first right of said L. E. McCulley, pro rata according to the several amounts in said subdivisions specified, and each of said plaintiffs in said subdivisions described shall suffer a proportionate deduction on the several amounts in said subdivisions specified, it being hereby decreed that there is no priority

or superiority among or between the rights of said plaintiffs in said subdivisions described.

D. It is further ordered, adjudged and decreed, that whenever the amount of water flowing in said stream does not exceed two hundred and fifty inches measured under a four inch pressure, that at such times said plaintiff L. E. McCulley, shall be entitled, as against all the other plaintiffs and defendants, to divert and use all of the water so flowing in said stream, and the said defendants and the other plaintiffs, shall not be entitled to divert or use any water from said stream.

E. That all of the foregoing rights of all of the plaintiffs, aggregating One thousand inches of water measured under a four inch pressure, are superior to any right, title or claim of any of the defendants in and to the waters of said creek, and whenever the amount of water flowing in said stream does not exceed One thousand inches, measured under a four inch pressure, the said defendants shall not have the right to divert or use any of the waters of said creek, but subject to the first rights of the plaintiffs herein to the first One thousand inches of the waters of said creek, said defendants, Herman Acty and Robert O. Fink, and wife, are the owners of and entitled to divert and use the next One hundred and ninety-five inches of the waters of said stream measured under a four inch pressure, upon the lands now owned or occupied by them, as follows: Herman Acty is the owner and entitled to divert and use One hundred and fifty inches of said One hundred and ninety-five inches, measured under a four inch pressure, and said Robert O. Fink and wife are entitled to divert and use and are the owners of Forty-five inches of said One hundred and Ninety-five inches, measured under a four inch pressure, and whenever the amount of water flowing in said stream in excess of the said One thousand inches, measured under a four inch pressure, is less than One hundred and Ninety-five inches, measured under a four inch pressure, said defendants Herman Acty and Robert O. Fink and wife shall share proportionately in the excess over said One thousand inches, according to the amounts herein decreed to be owned by them, it being hereby decreed that

there is no priority of right between said last named defendants.

F. It is further ordered, adjudged and decreed, that the several amounts of water hereinbefore decreed to be owned by the various and respective plaintiffs are to be measured at their several points of diversion from said creek, and for the purpose of determining whether or not there is at any time flowing in said stream any water in excess of the aggregate amounts owned by the plaintiffs, namely, One thousand inches, measured under a four inch pressure, that a concrete measuring device or wier is to be constructed and placed in the channel of said creek, at or near the point of diversion of plaintiff L. E. McCulley, which said measuring device is to be so constructed and so marked that any of the parties hereto can determine therefrom whether or not there is any water in excess of said one thousand inches flowing in said stream, and if so what amount of excess there is so flowing. Said measuring device is to be constructed at the joint expense of all of the parties hereto, said cost to be borne and paid by the parties hereto pro rata according to the amounts of water owned by them and is to be constructed under the supervision of some competent irrigation engineer to be selected by the parties hereto and the expense of such engineer to be a part of the cost of said device.

G. It is further ordered, adjudged and decreed, that the points of diversion of some of the plaintiffs herein are located at a considerable distance below the point of diversion of said L. E. McCulley, where said measuring device is to be placed, and that there is an appreciable loss of water by seepage and evaporation between said points, and the points of diversion of said defendants are above the points of diversion of some of said plaintiffs, and therefore for the purpose of determining what amount of water must be flowing in said stream at the point where said measuring device is placed to allow each and all of the plaintiffs to receive at their respective points of diversion the amounts herein decreed to them, and at the same time for the defendants to be able to determine whether

adjudged and decreed, that such loss of water between said measuring device and said lower points of diversion shall be estimated and determined during the spring of 1923, by the State Water Commission of the State of California, or by its representative or engineer, upon the visit of said engineer to said Cedar Creek, during said spring of 1923, and that such determination shall be filed in this action and shall be conclusive upon all of the parties hereto on said question of loss, and said lower divertors rights shall be increased at the point of said measuring device the amount found by said engineer to be necessary to deliver to their respective points of diversion the several amounts herein before decreed to be owned by them, and the rights of said defendants shall not attach to any water in said stream unless there is flowing therein at the said measuring device, the full amounts to which said plaintiffs are entitled, plus the amounts so found by said engineer to be necessary to cover said loss, and an excess over these amounts, and then said defendants shall be entitled to the said excess.

H. It is further ordered, adjudged and decreed, that whenever there is flowing in said stream any water in excess of the aggregate amounts hereinbefore decreed to said plaintiffs and said defendants, that such excess water over and above the necessary amount to supply all of said plaintiffs and defendants the rights hereinbefore decreed to be owned by them, shall be owned and diverted and used, by the said plaintiffs and defendants jointly, pro rata according to their several rights hereinbefore set forth.

I. It is further ordered, adjudged and decreed, between the plaintiffs T. B. Sizer and Jake Weber, and the defendants Robert O. Fink and wife, that said defendant shall have the right to divert any water that he may be entitled to hereunder through the same ditch now used by him to divert from the channel of said Cedar Creek, water heretofore conveyed from Toms Creek into Cedar Creek, and carried down the channel of said Cedar Creek, to the point of diversion of said ditch, which is located in the southeast corner of the northeast quarter of the northeast quarter of Section 6, township 42 North, Range 16 East, E.D.M., AND said last named plaintiffs shall not in any way obstruct, impede or interfere with

said last named defendants in the use of said ditch, and shall not obstruct or interfere with the free flow of any water which said defendants may be entitled to under this decree, through said ditch, to the said defendants.

J. It is further ordered, adjudged and decreed, that some of the parties plaintiff and defendant herein have heretofore been diverting water from Toms Creek into the channel of Cedar Creek, and conveying such water down the natural channel of Cedar Creek to their points of diversion from said Cedar Creek and there reclaiming said Toms Creek water and diverting the same from said Cedar Creek, under a claim of right, and said parties still claim the right to so divert the waters of said Toms Creek, into said Cedar Creek and convey the same down the channel of said Cedar Creek to their points of diversion and there to divert said water, and it is hereby ordered, adjudged and decreed that this decree shall in no way change or alter the said rights of said parties so claiming said Toms Creek water, and this decree is not intended to embrace or have any effect on the waters of said Toms Creek so turned into said Cedar Creek, but is only intended to deal with and decree the respective rights of the parties hereto in and to the water of Cedar Creek and the natural flow thereof, and said parties so claiming rights to the waters of said Toms Creek shall not be restricted or restrained in any manner from turning said Toms Creek water into the channel of Cedar Creek, and reclaiming said Toms Creek water at their several points of diversion from Cedar Creek.

K. It is further ordered, adjudged and decreed, that this decree covers all the rights, of every kind and character of each and all of the parties hereto, and said parties hereto have no other, further or different rights in the waters of said Cedar Creek and no other further or different rights belonging to the lands of the parties hereto, than the rights hereinbefore adjudged and decreed to them.

L. It is further ordered, adjudged and decreed, that each and all of the parties plaintiff and defendant herein, their and each of their agents, attorneys, employees, successors, and assigns, are hereby perpetually enjoined and restrained from in any manner violating this decree, or from interfering with, obstructing or impeding any or all of the other parties herein in their diversion and use of the respective quantities of the waters of said Cedar Creek, in the manner and at the times herein decreed.

M. It is further ordered, adjudged and decreed that each of the parties hereto pay his or her own costs herein incurred.

Done in open Court this 15th day of February, 1923.

J. O. Montair
Judge Presiding.